No. 86-715

IN THE

Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

SUBCLASS IV (UNITHOLDERS),

Petitioners,

vs.

FOX & COMPANY, REAVIS & McGRATH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Edward M. Glennon
Deborah M. Regan
LINDQUIST & VENNUM
4200 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
(612) 371-3211
Counsel for Respondent Fox & Company

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QUESTIONS PRESENTED

1. Whether the District Court denied due process to absent class members who received notice of indemnification provisions contained in certain settlement agreements and whose counsel appeared and objected on their behalf at a hearing held to determine whether the settlement agreements were fair, reasonable and adequate?

2. Whether by not modifying the indemnification provisions in certain settlement agreements presented to it and instead giving an objecting subclass the chance to "opt-out" and proceed to trial, the District Court coerced that subclass into accepting a settlement that it did not want?

3. Whether the Eighth Circuit's opinion is correct and does not conflict with any decisions of this court?

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STATEMENT

Subclass IV, one of five subclasses of investors in Flight Transportation Corporation ("FTC") securities, has asked the Court to review a decision of the United States Court of Appeals for the Eighth Circuit that upheld the District Court's approval of seven separate settlement agreements in the FTC Securities Litigation. The settlement agreements effectively brought the FTC litigation to a close.

In April of 1983, FTC shareholders and creditors entered into a "Sharing Agreement." That Sharing Agreement, approved by an earlier decision of the Eighth Circuit,[1] settled shareholder and creditor disputes regarding an escrow fund[2] and placed all recoveries from the FTC litigation into one fund to be distributed according to the Sharing Agreement's terms. The Sharing Agreement provided that out of the first $30 million in recoveries, Subclass IV, composed largely of financial institutions, would recover $12.5 million. The escrow fund alone contained approximately $25 million; therefore, once the Receiver sold some of FTC's assets and settled with one of the principals and FTC's insurance company, Subclass IV had locked in payment of at least 86% of its claims.[3] In fact, in late 1984, Subclass IV received $11 million, or 76%, toward the payment of those claims. No other subclass has received any funds to date.[4]

After extensive negotiations over a period of months, seven separate settlements were reached. The class members were sent notice of the settlements, including the indemnification provisions, and were given the opportunity to appear at a hearing and voice their objections. At the hearing, counsel for Subclass IV appeared and objected to the indemnification provisions contained in those settlement agreements.

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[1]*In re Flight Transportation Corp. Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984).

[2]The escrow fund contained the proceeds of the sale of FTC securities pursuant to FTC's June 3 and 4, 1982, Registration Statements. The proceeds from the sale totaled approximately $25 million with interest.

[3]The 86% figure is based on $14,597,458 in total approved claims for Subclass IV.

[4]With the exception of some investors who last year agreed to take a lesser sum than they would have been entitled to receive if they had waited until the litigation was complete to receive their funds.

The District Court then approved the settlements as fair, reasonable and adequate in a well-reasoned opinion addressing all legitimate concerns raised by the Subclass IV. The District Court gave the objectors the option to renounce their rights under the Sharing Agreement and go to trial if they did not approve of the settlements. Subclass IV, not willing to give up the favorable position it had under the Sharing Agreement or the $11 million that it had already received under the terms of that Sharing Agreement, appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals, after considering Subclass IV's claims within the context of the entire FTC litigation, determined that the District Court's decision contained no error of law, abuse of discretion, or clearly erroneous finding of fact.

REASONS FOR DENYING THE WRIT

I.

ABSENT CLASS MEMBERS WHO RECEIVED NOTICE OF INDEMNIFICATION PROVISIONS CONTAINED IN THE SETTLEMENT AND WHOSE COUNSEL APPEARED AND OBJECTED ON THEIR BEHALF WERE NOT DENIED DUE PROCESS.

Subclass IV attempts to create a due process issue by claiming that the notice of class action did not inform absent plaintiff class members that affirmative financial obligations might be imposed upon them.[1] It would have been improper, however, for the notice of class action to include such information:

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[1]Subclass IV's counsel has never purported to represent any other investors than those within Subclass IV, and no other subclasses have appealed the District Court's Order. Thus, when Subclass IV refers to "absent class members," it must be referring to those within Subclass IV. Subclass IV, however, contains only a few institutional investors who, upon information and belief, remained in close contact with the litigation at all times.

> [S]ome decisions authorize notice to the class to include notice of defense counterclaims, possible subjection to interrogatories, and potential cost liability to absentees who remain in the class. Apart from the questionable nature of these aspects of the class notice as a matter of law, inclusion of such items in a class notice constitutes a rather effective disincentive for remaining in the class. Such discouragement of absent members — at least as long as these items in the class notice are unsettled at best — appears contrary to the important objective of retaining neutrality and may actually mislead absent class members concerning their rights and exposures in the action. Accordingly, no reference to these items has been made in most class notices.

2 Newberg on Class Actions § 8.31 at 159 (2d ed. 1985). The class members *did,* however, receive notice of the indemnification provisions after they became part of the settlement agreements and before the District Court approved those agreements.[2]

In addition, the absent class members' interests were adequately represented. "Adequacy of representation, rather than notice, is the touchstone of due process in a class action."[3] Subclass IV's counsel appeared at the hearing and objected to the indemnification provisions in the settlement agreements, and the District Court took those objections into consideration in determining whether the settle-

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[2]The notice sent to the class in July, 1985 regarding the Fox settlement states that "Fox, its partners, employees and agents, past, present and future, will be indemnified with respect to claims against them by any person arising out of or relating to any transaction or occurrence involving FTC and Fox as more fully set forth in the Settlement Agreement." It also states that "[a]ll papers filed in this action are available for inspection at the office of the Clerk of Court."

[3]2 Newberg on Class Actions § 11.52 at 469 (2d ed. 1985).

ment agreements were fair, reasonable and adequate. Therefore, the District Court did not deny the absent class members due process. Because due process was not denied, the petition for certiorari should not be granted.

II.

BY REFUSING TO MODIFY THE SETTLEMENT AGREEMENTS AND, INSTEAD, GIVING AN OBJECTING SUBCLASS THE CHANCE TO "OPT-OUT" AND PROCEED TO TRIAL, THE DISTRICT COURT DID NOT COERCE THAT SUBCLASS INTO ACCEPTING A SETTLEMENT IT DID NOT WANT.

Subclass IV requested the District Court to *modify* the settlement agreements "so as to clarify that the Settling Claimants will not be required to personally provide a legal defense in any future actions or to indemnify the defendants in such actions." Memorandum of Law and Fact in Support of Objection to Proposed Settlements, August 29, 1985. Subclass IV never asked the District Court to disapprove the settlement agreements; it only proposed new indemnification language to be substituted in the settlement agreements. The District Court was not empowered, however, to rewrite the agreement between the parties:

> The options available to the District Court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case. The District Court could not enforce the settlement on the merits and award attorney's fees any more than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits.

Evans v. Jeff D., ... U.S. ..., ..., 106 S. Ct. 1531, ..., *reh'g denied*, ... U.S. ..., 106 S. Ct. 2909, (1986); Manual for Complex Litigation, Second § 30.41 (1986). The District Court in this case could not modify the settlement agreements submitted to it; it could only accept them or reject them. The District Court properly decided to accept them, but it also gave Subclass IV the chance to "opt-out" and proceed to trial. If Subclass IV had opted out in 1983 when it was originally given the chance to do so, it would not have received the $11 million toward recovery of its claims. Therefore, the District Court's requirement that Subclass IV return the money it had received before proceeding to trial was a reasonable one. Without that requirement, Subclass IV would have been allowed to remain in the litigation long enough to obtain a 76% recovery on its claims and then opt-out of settlements that would have brought in funds for the other subclasses. The Manual for Complex Litigation states that "the Court should not permit representatives, in violation of their fiduciary responsibilities, to become overly concerned with their individual interests and unfairly impede a desirable settlement on behalf of the class."[4] Similarly, Subclass IV, the only subclass to have received any funds to date, could not be permitted by the District Court to impede a desirable settlement on behalf of the remaining subclasses. Therefore, the District Court's actions were reasonable and in no way coercive; consequently, the petition for certiorari lacks merit and should be denied.

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[4]Manual for Complex Litigation, Second § 30.43 (1986).

III.

THE EIGHTH CIRCUIT'S OPINION IN THIS CASE IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

In order to comply with the requirements of Rule 17 of this Court, Subclass IV has made a veiled attempt to create a conflict between the Eighth Circuit's decision and decisions of this Court. When studied carefully, however, no conflict actually exists.

The holding of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. . . ., 105 S. Ct. 2965 (1985), in no way conflicts with the District Court's decision in this case. In *Phillips Petroleum*, this Court, in dicta, states that absent plaintiff class members are "*almost* never subject to counterclaims or cross-claims, or liability for fees and costs."[5] *Id.* at . . ., 2977 (emphasis added). Thus, even if "due process strictly circumscribes the burdens which may be placed on absent plaintiff class members,"[6] this Court has recognized that there may be some instances where absent class members will be subject to liability.[7]

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[5]At least one other district court has approved a class action settlement that might ultimately result in plaintiff class members "having to pay some monies." *Sommers v. Abraham Lincoln Federal Savings & Loan Association*, 79 F.R.D. 571, 579 (E.D. Pa. 1978).

[6]Brief of Petitioner at 13.

[7]This case, however, simply will not be one of those instances. Fox & Company entered into its settlement agreement nearly two years ago. At that time, at least one major defendant had not settled with the plaintiffs, and it had substantial cross-claims outstanding against Fox & Company. Since that time, all the defendants have now settled, and within their settlement agreements, they have assigned all of their claims to the plaintiffs. It has been over a year and a half since the District Court approved the settlement agreements, and not one new claim has been filed. The criminal trials of the FTC principals also have been completed, and no new claims have come to light as a result. With only one year remaining on the statute of limitations, although "one can conceivably spin out scenarios which would require these provisions to be invoked," the reality is that the possibility of such scenarios reaching fruition is now nonexistent.

Subclass IV also attempts to argue that the Eighth Circuit's decision conflicts with this Court's decision in *Evans v. Jeff D.*[8] In *Evans,* however, the parties were not given the option to reject the settlement and proceed to trial. Further, the decision of the Court of Appeals in *Evans,* which was overturned by this Court, did exactly what Subclass IV requested the District Court to do in this case. In *Evans,* the Court of Appeals upheld one portion of a settlement agreement and rejected another portion. It was in that context that this Court found it unacceptable that the parties were being required to accept a settlement agreement to which they had not agreed. Therefore, the Eighth Circuit's decision does not conflict with *Evans.*

In addition, Subclass IV claims that the Eighth Circuit's opinion conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1980). In that case, the Seventh Circuit stated that a federal district court cannot force a class to settle state law claims that are not pending in the federal action. Once again, no conflict actually exists. The District Court did not force anyone to accept any of the settlements. The District Court gave Subclass IV the option to return the funds it had received under the Sharing Agreement and proceed to trial. Subclass IV attempts to argue that the District Court's offer was not a legitimate one and was instead a "novel attempt" to circumvent the prohibition against court-imposed settlements. The Eighth Circuit correctly noted, however, that "[i]t would certainly not have been fair to permit Subclass IV, which to date has received over $11,000,000 in cash, much

[8] ___ U.S. ___, 106 S. Ct. 1531 (1986).

more than received by other members of the plaintiff class, to retain this money while also rejecting the present settlements." *In re Flight Transportation Corp. Securities Litigation,* 794 F.2d 318, 321 (8th Cir. 1986).

The District Court made a finding of fact that the indemnification provisions posed a risk to Subclass IV that was tolerable. The Eighth Circuit determined that that finding of fact was not clearly erroneous. The Eighth Circuit was correct when it stated:

> When Subclass IV accepted substantial cash payments under the Sharing Agreement, it knew that further settlement negotiations would be taking place against certain defendants, and that results of the negotiations would be submitted to the District Court for approval. The requirement of Court approval protected it against unfair imposition and, as a last resort, the Subclass also retains the right to go to trial against the settling defendants, provided always that it may not take the benefit of this course of settlement negotiations without also assuming the burdens which other members of the plaintiff class have assumed.

794 F.2d at 321-22.

The District Court's decision, and the Eighth Circuit's decision upholding it, are both well-reasoned opinions. Neither decision conflicts with any of the decisions of this Court; neither decision will affect any more persons than the parties to this litigation. Thus, both decisions should be allowed to stand.

CONCLUSION

For the reasons set forth above, Fox & Company respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

Edward M. Glennon
Deborah M. Regan
LINDQUIST & VENNUM
4200 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
(612) 371-3211
Attorneys for Respondent
Fox & Company

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